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No. 08-1449

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IN THE

Supreme Court of the United States

CONNECTION DISTRIBUTING CO., *et al.*,
Petitioners,

—v.—

ERIC H. HOLDER, JR., Attorney General,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

In arguing that "further review is... not warranted" of the Sixth Circuit's decision upholding the constitutionality of a federal statute criminalizing the failure to create and maintain identification records in connection with sexually explicit expression, Opp. 10, Respondent overlooks a few important facts about the statute.

According to Respondent, 18 U.S.C. § 2257 "establishes a comprehensive recordkeeping system for verifying the age of performers used in the pornography industry." Opp. 2. In its "current form," the Respondent tells us, the statute covers only depictions of *actual* sexually explicit conduct, *id.*, and "applies only to sexually explicit images for sale or trade." *Id.* at 9. Respondent further represents that "section 2257 does not ban any sexually explicit images." *Id.* at 11. And as for disclosure to the government of the information required to be maintained in the records, Respondent explains, that information is "made available" to the government "only on request" or "if necessary." *Id.* at 8, 17.

First, the statute's application is not confined to "the pornography industry" as the Respondent suggests. Under its plain, unambiguous language, it applies to "any person" and to "whoever produces" any visual expression that contains sexual imagery. 18 U.S.C. § 2257 (a), (b), (c), (e), (f). Artists, photographers, sex educators, textbook publishers, documentary makers, adults sending sexually explicit images to one another on their cell phones or on a social networking website, a wife e-mailing a suggestive photo of herself to her husband in the

military, and married couples like Petitioners Jane and John Doe who take photographs of themselves as part of their sexual relationship–in short, anyone who creates sexually explicit visual depictions–must comply with its record keeping and labeling provisions or face the prospect of a five year prison term. In fact, it imposes strict liability for failure to create or maintain the requisite records. 18 U.S.C. § 2257 (f)(1).

Second, contrary to Respondent's contention that 18 U.S.C. § 2257 applies only to depictions of ***actual*** sexually explicit conduct, the statute now applies to "lascivious exhibition of the genitals and pubic area" –not just images of sexual acts. Adam Walsh Child Protection and Safety Act of 2006, Pub. L.109-248, Title V, § 502(a). Moreover, Congress, in the Adam Walsh Act, enacted a companion statute, 18 U.S.C. § 2257A, that extends the same record keeping and labeling requirements to depictions of ***simulated*** sexually explicit conduct.[1] *Id.* at § 503. Thus the current scope of the record keeping and labeling requirements includes visual depictions of ***both*** actual sexually explicit conduct ***and*** simulated sexually explicit conduct as well as "lascivious exhibition" of the genitals and pubic area.

Third, nowhere in the statute is there any language that confines its application to expression offered "for sale or trade," as the Respondent claims.[2]

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[1] As noted in the Petition for Writ of Certiorari, this legislation was passed after Petitioners had filed their appeal in the Sixth Circuit.

[2] The majority of the court below declined to adopt this interpretation–acknowledging that the "textual hook" for this

The government points to no statutory language, phrase, clause, or provision that supports this reading. Rather the Respondent tells us that "the government has taken the position" that the statute does not apply to expression created for "private use," and thus, he argues, the statute's provisions are so confined. Opp. 14-15. But Respondent's position cannot bear the weight of the statute's language, which unambiguously covers private, non-commercial sexual images as well as those created for commercial distribution.

Indeed, Respondent's contention that the statute applies only to expression offered for sale or trade is completely contradicted by the Adam Walsh Act, which in addition to extending the record keeping and labeling requirements to images of genitalia and simulated sexually explicit expression, created an exemption for producers of certain sexual imagery. Section 2257A(h) creates an exemption for compliance with both §2257A and §2257 for those who produce images of simulated sex acts or lascivious exhibition of genitals. (The exemption does not apply to producers of actual sexually explicit conduct.) The exemption is given to those who, in the normal course of their business, maintain tax, labor and other records containing individually identifiable information for persons depicted in that expression, and who certify that fact to the Attorney General.

The first of three conditions a producer must satisfy to qualify for the exemption is that his expression "is intended for ***commercial*** distribution."

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interpretation was open to question, App. 31, while the dissents rejected it outright. App. 48-49.

(Emphasis added). 18 U.S.C. § 2257A(h)(1)(A)(i). If, as the government argues, 18 U.S.C. §2257 applies only to material produced for commercial distribution in the first place, there would be absolutely no reason to require a producer to establish that his expression is intended for commercial distribution to qualify for §2257A(h)'s exemption. Clearly then, the statutory scheme applies to those who produce sexual images for private, non-commercial purposes and who are not eligible for the exemption.

Respondent's claim that the statute can be construed to apply only to expression offered for sale or trade to limit its unconstitutional reach, further becomes undone when examined in light of the very facts of this case. Respondent has argued that 18 U.S.C. § 2257 applies to Petitioners Jane and John Doe, a real–not hypothetical–married couple who wish to create sexually explicit expression of themselves for their own private, non-commercial use. The exclusion that Respondent crafts for such private expression dissolves, however, once Mr. and Mrs. Doe takes it beyond their bedroom door and seeks for their own private purposes to share it with other like-minded couples. In that instance, the full panoply of statutory and regulatory requirements must be met–even though Mr. and Mrs. Doe are not "selling or trading" their expression.[3]

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[3] Ironically, the "sale or trade" limitation that the government seeks to read into the statutory language would, nevertheless, appear to have the perverse effect of exempting a photograph taken by a parent of his sexual abuse of his own child for the parent's private use in his own home.

Fourth, contrary to Respondent's claim, the actual effect of 18 U.S.C. § 2257 is, in fact, to ban certain sexually explicit images. A producer of expression whose content depicts actual or simulated sexually explicit conduct will be absolutely prohibited from producing that expression if he or she cannot obtain government-issued photo identification for the persons depicted in it. *See, Hearing Before the Committee on the Judiciary*, United States Senate, 100th Cong. Second Session on S. 703, S. 2033, June 8, 1988, p. 93, 94. That the persons depicted are 50, 60 or 70 years old, that the image is contained in a medical textbook or displayed in a museum, matters not. Unlike in a prosecution for child pornography, it is no defense to prosecution under 18 U.S.C. § 2257, that the person depicted is an adult. And unlike in a prosecution for obscenity, it is no defense that the depiction holds political, artistic or scientific value. Its prohibition is absolute–even if, as is the case presented here, the persons depicted are adults who fully and completely wish to have their images produced and published. The record keeping requirements therefore ban the creation and publication of any visual depiction of sexually explicit conduct for which its producer cannot secure the requisite photo identification–***the precise position in which Petitioner Connection Distributing finds itself.***

Lastly, the government, in arguing that the statute poses little threat of chilling expression, states that records containing personal information about persons depicted in sexually candid imagery need be "made available to the government only on request." Opp. 8. This modest description of the inspection procedures the government has implemented to enforce 18 U.S.C.

§ 2257's provisions does not do them justice, however.

Title 28 C.F.R. § 75.5[4] provides that investigators authorized by the Attorney General are to enter, without a warrant, "without delay" and "at reasonable times," the premises where a producer's records are maintained. 28 C.F.R. § 75.5 (a). The regulation expressly directs that "advance notice of record inspections ***shall not*** be given." 28 C.F.R. § 75.5 (b). (Emphasis added). Those producers of expression "who do not maintain at least 20 normal business hours per week," must provide notice to the Attorney General of "the hours during which records will be made available for inspection, which in no case may be less than 20 hours per week." 28 C.F.R. § 75.5 (c). The investigator may copy any record and may seize any evidence of the commission of a felony, all without a warrant. 28 C.F.R. § 75.5 (e), (g). He or she may also exercise any "otherwise lawful investigative prerogatives" during the inspection. 28 C.F.R. § 75.5 (f).

Refusal to allow the inspection is punishable as a felony under the statute. 18 U.S.C. § 2257 (f)(5).

Information or evidence obtained from the records may be used in prosecuting violations of the federal obscenity laws. 18 U.S.C. § 2257(d)(2).

So it is simply not true that the information need be provided to government "only on request." On penalty of prosecution, the producer of such expression must allow government investigators, who appear

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[4] Title 18 U.S.C. § 2257 (g) provides that the Attorney General shall issue regulations to carry out the statute's provisions.

without notice or warrant, to enter his home, studio or office, and permit them to search through and copy the records containing personal information about the persons depicted in the expression he produces. Furthermore, the information that the investigators gather from the records can be used as evidence in prosecuting violations of federal obscenity law; they are free to seize other things that they deem to be evidence of a felony during their inspections as well.

I. THIS CASE RAISES AN IMPORTANT QUESTION AS TO WHETHER 18 U.S.C. § 2257 IS UNCONSTITUTIONAL AS APPLIED TO PETITIONERS UNDER THE FIRST AMENDMENT.

The Respondent echoes the en banc majority's conclusion that 18 U.S.C. § 2257 "might be unconstitutional as applied to particular sexually explicit materials depicting only mature adults." Opp. 14.

Curiously, that is precisely what the evidence established with regard to Petitioners.

It is important to note that this case came before the appellate court on appeal from a grant of summary judgment in Respondent's favor. All facts, then, are to be viewed and all inferences drawn in favor of Petitioners. *Crawford v. Metropolitan Government of Nashville and Davidson County*, __U.S. __, 129 S.Ct. 846, 849, n.1 (2009). The government has ignored this standard in offering a recitation of facts that is viewed in a light most favorable to itself. *See e.g.* Opp. 4, 8, 12, 14, 16, 17.

Nonetheless, the evidence established that: (1) the government's own expert reviewed numerous copies of Connection's magazines and concluded that the vast majority of the persons depicted were mature adults and that the average person reviewing the photographs would not need photo identification to reach that conclusion; (2) Petitioners' experts provided unrebutted testimony that the overwhelming majority of the population of swingers who published messages in Connection's magazines were mature adults in their 30s, 40s and 50s; (3) the published photographs were frequently cropped versions of the actual photographs submitted and thus were only a small portion of what Connection's editor reviewed in assuring herself that the photographs were of adults; (4) the editor, in addition to the complete and uncropped photographs, had available to her other identifying details, such as credit card information and past history of publication, that allowed her to make an assessment of age; (5) adults wishing to publish their sexually explicit expression in Connection's publications overwhelmingly refuse to submit photo identification for inspection by the government; and (6) an entire body of constitutionally protected expression involving adults decades beyond the age of majority has been suppressed by the statute's demands.

Respondent nevertheless characterizes the statute's unconstitutional application to Petitioners' magazines as a "factual question," not deserving of this Court's attention. Opp. 12.

That is ***not*** a reason to deny review here, however. For in a First Amendment case, appellate courts, including this Court, have an obligation to make an

independent examination of the factual record to assure that there is no intrusion on protected expression. *Jenkins v. Georgia,* 418 U.S. 153, 160 (1974); *N.Y. Times v. Sullivan*, 376 U.S. 254, 284-86 (1964); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 108 (1990).

And if, as the Respondent suggests, as-applied challenges "present the appropriate mechanism for dealing with any possible unconstitutional applications of the statute," Opp. 17, then this case presents the perfect vehicle for this Court to demonstrate that very premise–examining 18 U.S.C. § 2257 as applied to Petitioners on a well-developed record to resolve the issues of constitutional importance it raises.

II. THIS CASE RAISES AN IMPORTANT QUESTION AS TO WHETHER 18 U.S.C. § 2257 IS UNCONSTITUTIONALLY OVERBROAD ON ITS FACE.

The majority and the dissents of the court below agreed–in theory– that 18 U.S.C. § 2257 was overbroad in a number of its applications. App. 27.[5] They disagreed over whether its overbreadth was substantial, however. The majority found it was not; the dissents concluded that it was.

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[5] Similarly, the majority in the D.C. Circuit Court of Appeals in *American Library Association v. Reno*, 33 F.3d 78 (D.C.Cir. 1994) *cert denied* 515 U.S. 1158 (1995) recognized that the statute threatened several unconstitutional applications, but declined to address its overbreadth on the record before it, *id.* at 83, 90, 94, while the dissent found the statute unconstitutionally overbroad. *Id.* at 94-95.

This Court has instructed, "[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, __U.S. __, 128 S. Ct. 1830, 1838 (2008).

The majority and the dissents concurred that, on its face, the language of the statute applied universally to sexually explicit expression created by adults –without regard to the clear and obvious maturity of the persons depicted in it and without regard to the private or intimate circumstances in which it was created. The majority's decision holding that 18 U.S.C. § 2257 was not *substantially* overbroad was based, not on the conclusion that its potential unconstitutional applications were "fanciful" or unsupported by its text, but rather on its belief that Petitioners had not supplied sufficient *evidence* demonstrating the actual unconstitutional applications of the statute. App. 32. Respondent contends that the majority's analysis was correct. Opp. 14. Petitioners maintain it was not.

Contrary to the majority's appraisal of it, the record contained ample evidence of these applications. Petitioners produced evidence showing that roughly three million persons, of whom the vast majority are in their 30s, 40s, or 50s, engage in swinging, and that many of these mature adults create sexually explicit expression of themselves for their own private, non-commercial use. In fact, ***Respondent's*** evidence showed that more than 13-million personal ads containing sexually explicit text and images were placed on a single website by adults who were also well beyond the age of majority.

With regard to applications of the statute to expression created in the marital bedroom, the majority concluded that Respondent's representation to the court that he had no intention of enforcing the statute against married couples who create such expression in their bedrooms for their own private use, sufficed to arrest these applications of the statute. App.31, 33.

The substantiality of a law's overbreadth–on which its constitutionality rises or falls–has never before been determined by the claims of the government's intent not to enforce it in certain applications. While a statute's overbreadth can be cured by a court's limiting construction or judicially severing offensive provisions, no decision of this Court has upheld an unconstitutionally overbroad statute on the strength of the claims of a government advocate appearing before it, that the government will not enforce certain of its applications that would make the law substantially overbroad. *Cf. Stenberg v. Carhart,* 530 U.S. 914, 940-41 (2000); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 645-46 (1988).

Judge Sloviter wrote in *A.C.L.U. v. Reno,* 929 F. Supp. 824, 857 (E.D.Pa. 1996):

> [T]he First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well.

See also, (Kennedy, J.) (dissenting). App. 44.

Indeed, the government's promise of non-enforcement offers little consolation to Petitioners Jane and John Doe, a married couple who participate in swinging, and testified, by way of affidavit, that they, as well as many other like-minded adults, wish to create and publish such expression as part of their sexual relationship for sharing with others–as volumes of Connection's magazines bear witness.

They and other mature adults like them have refrained from producing such expression in the face of 18 U.S.C. § 2257. And assuming that still other adults who produce sexually explicit expression in their bedrooms are aware of the legal obligations that the 18 U.S.C. § 2257 imposes, *Atkins v. Parker*, 472 U.S. 115, 131 (1985), its criminal record keeping and labeling requirements can likewise be expected to deter, if not silence their expression altogether as well. *Members of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, n. 19 (1984). ("Where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct" justifies an overbreadth attack.)

This Court fashioned the overbreadth doctrine to allow the constitutional protections of the First Amendment to extend to those least able to uphold them, but for whom they have profound meaning and worth. As a result of decisions like that of the en banc majority, the doctrine is at risk of becoming nothing more than a theory, offering no relief to the vulnerable and consequently, dimming the First Amendment's light.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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